In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-236

MICHAEL BUDZANOSKI and JOHN SEDDON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners, the president and the secretary-treasurer of District 5, United Mine Workers of America, were convicted of conspiring to cause and of willfully causing false entries to be made in the books and records of District 5 on three separate occasions, in violation of 29 U.S.C. 439(c). They were given consecu-

tive sentences of one year's probation on the conspiracy count and on each of the three substantive counts.[1] Petitioners were each fined $500 on the conspiracy count and directed to pay the costs of prosecution.

The government's evidence showed that members of the district executive board, at petitioners' direction, prepared false vouchers indicating that they had expended their own funds to avert wildcat strikes. They returned the "reimbursements" which they received to petitioners, who put the money in a secret fund intended for use during the upcoming United Mine Workers Union presidential election campaign of W. A. "Tony" Boyle. The three substantive counts of the indictment were based on two of the false vouchers and a false entry in the executive board's monthly financial report reflecting expenditures in accordance with the false vouchers.

Petitioners assert five separate grounds for granting the writ based upon alleged errors of the trial court in charging the jury and in admitting certain evidence. The detailed opinion of the court of appeals fully and properly addresses most of the contentions petitioners raise in this Court, and we rely primarily on that opinion. We add some brief comments, however.

1*a*. Petitioners allege that the district court erroneously charged the jury that they could be found

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[1] Title 29 U.S.C. 439(c) is a misdemeanor statute. Accordingly a conspiracy to violate 29 U.S.C. 439(c) is treated as a misdemeanor (18 U.S.C. 371).

guilty of willfully making false entries in the books and records of District 5, United Mine Workers of America, if they knew the entries were false and were "conscious of the fact that what * * * they were doing was contrary to law" or were "acting wholly in disregard of what the law may provide * * * without making a reasonable effort to determine whether the plan pursued was contrary to law" (Pet. 17).

Petitioners argue that an act "willfully" done is one which is motivated by a specific wrongful purpose, and that the jury was improperly permitted to find them guilty for acts which may only have been negligent. The portion of the charge to which objection is now made was taken from petitioners' request to charge (Pet. 15, 18). Under these circumstances, petitioners may not assert this issue on appeal. In any event the court of appeals thoroughly considered petitioners' contention and properly rejected it in its opinion upon which we rely (Pet. App. 38a-39a).

Contrary to petitioners' contention (Pet. 19), there is no conflict among the courts of appeals with respect to the meaning of the term "willfully" in 29 U.S.C. 439(c).[2] Moreover, petitioners' reliance on the

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[2] *United States* v. *Haggerty*, 419 F. 2d 1003 (C.A. 7), certiorari denied, 397 U.S. 1064, cited by petitioners, involved the issue whether, despite a deliberate act of concealment, the statute had not been violated because the funds were ultimately to be spent for union purposes. In rejecting this defense the court held (419 F. 2d at 1008) that "making of * * * [a] false entry is not rendered innocent by the expectation that the union will eventually ratify the disbursement and make further concealment unnecessary." The defense which

construction of the term in other statutes ignores this Court's oft-stated direction that the meaning of the term is dependent upon the context in which it is used and upon the intent of Congress in a particular statute. *United States* v. *Murdock*, 290 U.S. 389, 394-95; *Spies* v. *United States*, 317 U.S. 492, 497; *Screws* v. *United States*, 325 U.S. 91, 101. Cases construing other statutes are, therefore, of little significance here.

b. Petitioners also make a related claim that they had "tried their cases and prepared their summations to the jury" (Pet. 28-29) relying on the trial court's preliminary instruction to the jury, at the start of the case, that "[w]illfully means with a bad purpose" (Pet. 14). The claim of "surprise" and resulting prejudice is belied by their request to charge which was adopted by the trial judge.[3]

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the court of appeals rejected in *Haggerty* is strikingly similar to that asserted here by the petitioners (Pet. 7-8). *United States* v. *Spingola*, Nos. 69-CR-453, 69-CR-454 (C.A. 7), decided June 12, 1972, is likewise inapposite here. The case involved the provisions of the Landrum-Griffin Act dealing with the willful failure to file annual reports pursuant to 28 U.S.C. 439(a) and 439(d). The court of appeals held that the statute did not make criminal a negligent failure to file. The court of appeals here did not hold that petitioners could be convicted for negligently making false entries. The charge here was concerned with the issue of what, in addition to a "knowing" falsehood, must be shown to make the act "willful."

[3] Petitioners' claim that the trial judge improperly interrupted "counsel on several occasions during their closing [argument] and prohibit[ed] them from arguing to the jury from the statute" is without merit. The trial court interrupted only to ask that counsel not repeat the preliminary charge which the court intended to expand upon. The judge did not

2. The trial court did not err, as petitioners assert (Pet. 25), in failing to advise the jury of the employment disability which petitioners faced as a consequence of conviction. It is hornbook law that, except where a statute requires a jury to determine the sentence, the penalties and other consequences of a conviction are of no concern to a jury. See Mathes & Devitt, *Federal Jury Practice and Instructions* (1965), § 15.07, and cases cited.

3. The admission of evidence showing the motive for the false entries (to raise money for the upcoming election campaign) was proper (Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 404(b), 51 F.R.D. 346). The fact that it incidentally disclosed a violation of another statute did not, as petitioners claim (Pet. 25-27), result in their being tried for an offense not charged in the indictment. The court's instructions here, unlike those given in *Stirone* v. *United States*, 361 U.S. 212, required proof of the specific allegations charged in the indictment as a prerequisite to conviction.

4. Petitioners claim that the district court erred in refusing to admit into evidence the government's trial memorandum which they claim contained "admissions" which would have "required the acquittal

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interrupt when counsel told the jury "what I think 'willful' is" (Pet. 16). Petitioners' final contention on this issue—that error was committed when the court initially indicated that it would not give their requested charge and later changed his mind—is baseless.

of Petitioners" (Pet. 28). The portion of the memorandum on which they rely stated (Tr. 1722a):

> In truth, no funds had been disbursed; they had merely been transferred from the union's checking account to a cash hoard maintained by the secretary-treasurer.

Petitioners do not explain why they regard this statement as a conclusive admission. As we understand it, the argument rests on the language of 29 U.S.C. 439(c) which makes it an offense to make "a false entry in * * * any books, records, reports, or statements *required to be kept by any provision of this subchapter*" [emphasis added]. Under 29 U.S.C. 431(b) "disbursements made" by the union must be recorded as there prescribed. Petitioners' claim appears to be that if "[i]n truth, no funds had been disbursed," the records were not of the kind required to be kept by law; and, despite the false statements, they could not be prosecuted. But the portion of the pre-trial memorandum with the statement at issue, which described the transfer of the union funds from the "union's checking account to the cash hoard maintained by the secretary-treasurer," merely alluded to the proof at trial. The conclusion that "[i]n truth, no funds had been disbursed" was merely intended to indicate that the funds had not actually been spent, although they had obviously been "disbursed" from the union's treasury. Thus, the transactions were legally required to be recorded and substantiated.

In addition, the trial court properly held that any

so-called admissions in the pre-trial memorandum were not binding on the government. See *United States* v. *Santos*, 372 F. 2d 177, 180-181 (C.A. 2); *United States* v. *Tramontana*, 460 F. 2d 464, 466-467 (C.A. 2). Moreover, the pre-trial memorandum was not a formal pleading or stipulation, which is generally binding on a client (McCormick, *Evidence* (1954), p. 520) but an informal document merely intended to outline the case for the court. Cf. *Canuso* v. *City of Niagara Falls*, 3 F.R.D. 374, 376 (W.D.N.Y.). The United States Attorney indicated that he had not intended to concede that the funds at issue had not been disbursed (Tr. 1066) and the trial court properly declined to admit the document.

5. Petitioners' final claim is that the district court improperly admitted inculpatory hearsay evidence. But the testimony about which petitioners complain was the prior inconsistent statements of a defense witness placed in their factual context, and were admitted for impeachment and not to show the truth of the out-of-court conversation. Thus, the evidence was not hearsay at all.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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